No. 90-1271

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In the Supreme Court of the United States

OCTOBER TERM, 1990

NORFOLK AND WESTERN RAILWAY COMPANY, PETITIONER

v.

OLEN ROBERSON, AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a railroad worker who works in or around a coal mine or coal preparation facility in employment that is integral to the extraction or preparation of coal is a "miner" within the statutory definition of that term in the Black Lung Benefits Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 918 F.2d 1144. The decision of the Benefits Review Board (Pet. App. 17a-28a) and the decision of the administrative law judge (App., *infra*, 1a-15a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1990. The petition for a writ of certiorari was filed on February 11, 1991. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Norfolk & Western Railway Company (N&W) employed respondent Olen R. Roberson as a brakeman and conductor from 1947 until his retirement in 1979. Between 1956 and 1973, Roberson worked on rail cars used to haul raw coal from several coal extraction sites to a preparation plant where the coal was cleaned, washed, graded, and loaded for delivery. His duties at those locations included coupling and uncoupling hoses between the railroad cars, setting and releasing brakes, and obtaining loading numbers from individual cars. Although he rode on the trains from the extraction sites to the preparation plant, a distance as far as 36 miles, his duties required him to spend a significant part of his workday at the extraction and preparation sites, where he was exposed to large amounts of coal dust. Pet. App. 3a-4a.

Roberson filed an application for benefits under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, which provides benefits to coal miners who are totally disabled due to pneumoconiosis arising out of coal mine employment. Following an evidentiary hearing, an administrative law judge determined that Roberson had established entitlement to benefits under the interim regulations, 20 C.F.R. Pt. 727, and ordered N&W, as the responsible operator, to pay those benefits. App., *infra*, 1a-15a. Applying the three-pronged "status/function/situs" test of coverage established by the Benefits Review Board in *Whisman* v. *Director, OWCP*, 8 Black Lung Rep. 1-96, 1-97 (Ben. Rev. Bd. 1985), the ALJ determined that between 1956 and 1973, Roberson primarily worked with raw rather than processed coal (status), that his work transporting coal from the extraction

sites to the preparation plant during that period was integral to the coal production process (function), and that he spent a significant portion of his time at the extraction and preparation sites (situs). App., *infra*, 3a-7a. The ALJ concluded that Roberson qualified as a "miner" under the Act, *id.* at 6a, and that petitioner was the operator responsible for the payment of black lung benefits, *id.* at 7a-9a. The ALJ reasoned that N&W maintained a continuing presence at the mine sites and, by transporting raw coal to the preparation plant, it provided services essential to the preparation of the coal within the meaning of the regulatory definition of "operator," 20 C.F.R. 725.491(a). App., *infra*, 9a.

2. The Benefits Review Board affirmed the ALJ's order awarding benefits. Pet. App. 17a-28a. Applying the legal standard set forth in *Whisman*, the Board concluded that there was substantial evidence supporting the ALJ's findings that Roberson transported raw coal as an integral part of the coal production process and spent a significant portion of his workday at the mine sites and preparation plant. *Id.* at 19a-22a. The Board rejected N&W's "policy-based" considerations, noting that neither the Act nor its implementing regulations specifically exclude railroad workers from coverage and that no such exclusion was intended. *Id.* at 22a. The Board also was unpersuaded that the existence of other federal statutes pertaining to disabled railroad workers limits the scope of coverage of the Black Lung Benefits Act. *Id.* at 22a-23a. Finally, the Board held that N&W was an "operator" in that it employed a "miner" and maintained a "continuing presence" at the mine. *Id.* at 23a-25a.[1]

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[1] The Board also upheld the ALJ's finding that Roberson met the health-related requirements for benefits under

3. The court of apepals affirmed in a "necessarily narrow" holding. Pet. App. 1a-10a. Applying this Court's analysis in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court of appeals looked first to the statutory definition of a "miner" set forth in Section 402(d) of the Black Lung Benefits Act, 30 U.S.C. 902(d). The court concluded that a transportation worker who works in or around a coal mine in the extraction or preparation of coal comes within that definition under the plain language of Section 402(d). Pet. App. 4a-5a.[2] The court then determined that Roberson met this definitional test because he was involved in hauling raw coal from coal mines to the coal preparation plant, such transportation was part of the preparation process, and Roberson spent a significant amount of time in or around "coal mines," which the Act defines to include a coal preparation plant. *Id.* at 5a-6a. The court therefore had "little difficulty in concluding that the plain language of the Act, especially when reinforced by the 1978 amendment [adding a reference to "transportation" workers], manifests a clear Congressional intent to include in the definition of miner a small group of transportation workers of which Roberson was a member." *Id.* at 6a.

The court rejected petitioner's various arguments

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the Act. Pet. App. 25a-27a. N&W did not challenge that finding in the court of appeals and does not do so in this Court.

[2] The court concluded that the statutory language also requires, in the case of a transportation worker, that the worker has been "exposed to coal dust as a result of such employment," but noted that N&W did not dispute Roberson's coal dust exposure (Pet. App. 5a). See also 20 C.F.R. 725.202(a) (providing a rebuttable presumption that a transportation worker is exposed to dust when working in or around a coal mine or coal preparation facility).

that railroad employees are fundamentally different from other transportation workers. Pet. App. 6a-9a. First, the court observed that because the "plain language" of the Act supports the Board's decision, it did not need to resort to the legislative history. *Id.* at 6a-7a. It added that, in any event, the legislative history is not to the contrary since the Conference Committee report—the "most persuasive evidence of Congressional intent"—"sticks closely to the literal language of the statute" and does not exclude railroad workers from the Act's coverage. *Id.* at 7a n.3. Second, the court rejected petitioner's argument that coverage under the Black Lung Benefits Act would be inconsistent with other federal legislation protecting railroad employees. *Id.* at 7a-8a. The court noted that there was nothing to indicate that Congress intended any of the statutes pertaining specifically to railroad workers to preclude resort to the Black Lung Benefits Act and that, in fact, the Federal Employers' Liability Act (FELA), 45 U.S.C. 51, 58, specifically provides that it is not exclusive of any other federal remedy. Pet. App. 8a.

The court of appeals found irrelevant petitioner's observation that interstate railroads are regulated by the Interstate Commerce Commission. Pet. App. 8a. The court held that the ALJ's undisputed finding that Roberson spent a significant portion of his workday at the mines and preparation plant defeated petitioner's implicit argument that Roberson's role as a crew member during the 36-mile trip from the mines to the preparation plants took him outside of the Act's "situs" and "function" requirements. *Id.* at 8a-9a. After noting that "[i]n the ordinary case" many railroad employees may not qualify for benefits, the court stated: "If a claimant fulfills all the statutory requirements, however, as Roberson has here, we

decline to hold that his status as a railroad employee negates his recovery of benefits under the Act to which he otherwise would be entitled." *Id.* at 10a.[3]

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Although petitioner suggests otherwise, the court of appeals' "necessarily narrow" (Pet. App. 10a) and fact-based holding is unlikely to have a significant impact on the railroad industry. Accordingly, further review is unwarranted.

1. Petitioner primarily contends (Pet. 9-14) that the court of appeals' determination that Roberson comes within the statutory definition of "miner" is inconsistent with the purposes and legislative history of the Act. As the court below properly noted, however, the starting point in statutory interpretation is the language of the statute. Pet. App. 5a. See *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 308 (1989). Section 402(d) of the Black Lung Benefits Act, defines a "miner" as

> any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction *or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.*

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[3] The court also upheld the ALJ's finding that N&W qualified as an "operator" under the Act based on its continuing presence at the mines and its provision of services essential to the preparation of coal. Pet. App. 9a. Petitioner does not challenge that determination in this Court (Pet. 5 n.4).

30 U.S.C. 902(d) (emphasis added). See 20 C.F.R. 725.101(a)(26). Based on this language, the court of appeals properly concluded (Pet. App. 5a), as has every other court of appeals to address the issue, that the statute includes within its definition of "miner" *any* transportation worker involved "in the extraction or preparation of coal" who works "in or around a coal mine." [4]

The court properly applied that "situs/function" test to the facts of this case and concluded that Roberson's work during the relevant period placed him within the statutory definition of "miner." It was undisputed that Roberson hauled "raw coal from extraction sites (mines) to the preparation plant, which also is considered a coal mine under the Act." Pet. App. 5a-6a.[5] His work transporting coal to the prep-

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[4] See, *e.g.*, *Hanna* v. *Director, OWCP*, 860 F.2d 88 (3d Cir. 1988) (tug boat operator who assisted with loading process at tipple covered); *Stroh* v. *Director, OWCP*, 810 F.2d 61, 63 (3d Cir. 1987) (self-employed truck driver who hauled coal to processing plants covered); *Southard* v. *Director, OWCP*, 732 F.2d 66, 69 (6th Cir. 1984) (applying identical analysis to question of whether transportation worker is covered); *Mitchell* v. *Director, OWCP*, 855 F.2d 485, 489 (7th Cir. 1988) (railroad employee who shoveled and cleaned out railroad cars to ready them for loading at adjacent preparation plant was covered "miner").

[5] The Federal Mine Safety and Health Act of 1977 (FMSHA), which is applicable to the Black Lung Benefits Act (subchapter IV of the FMSHA), provides:

> For the purposes of subchapters II, III, and IV of this chapter, "coal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting

aration plant was part of the preparation process (function); and he spent a significant part of his time in or around a "coal mine" (situs). *Id.* at 6a. Indeed, the facts here are virtually "indistinguishable" (*ibid.*) from the Fourth Circuit's earlier decision in *Roberts* v. *Weinberger*, 527 F.2d 600 (1975), in which the court held that even before the 1977 amendment, the Act was "unambiguous in extending coverage" to truck drivers who haul coal between a strip mine and the tipple.

2. Although the broad statutory language contains no express or implicit exclusion for railroad workers, petitioner asserts (Pet. 7-14) that inclusion of such workers is not consistent with the Act's legislative history or purposes. As this Court recently reiterated, however, the best evidence of a statute's purpose "is the statutory text adopted by both Houses of Congress and submitted to the President." *West Virginia University Hospitals, Inc.* v. *Casey*, No. 89-994 (Mar. 19, 1991), slip op. 15. "Where that contains a phrase that is unambiguous—that has a clearly

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> from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, *and the work of preparing the coal so extracted, and includes custom coal preparation facilities.*

30 U.S.C. 802(h)(2) (emphasis added); see also 20 C.F.R. 725.101(a)(22)-(25). This extremely broad definition of the term "coal mine" evidences congressional intent that all facilities at a preparation plant be covered. See *Harmon Mining Corp.* v. *FMSHRC*, 671 F.2d 794, 796-797 (4th Cir. 1981) (railroad tracks that were owned by railroad but that adjoined preparation plant and were on mine property constituted a facility at the preparation plant and were therefore part of mine).

accepted meaning in both legislative and judicial practice—we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process." *Ibid.* In any event, the purpose and legislative history of Section 402(d) support the court of appeals' construction of the term "miner."

In 1977, Congress expanded Section 402(d)'s definition of a "miner" from "any individual who is or was employed in a coal mine" to include "an individual who works or has worked in * * * transportation in or around a coal mine." The Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 2(b), 92 Stat. 95, codified at 30 U.S.C. 902(d). The focus of that amendment was not upon exclusion, but upon inclusion of additional workers within the Act's coverage. While the Senate Committee Report and the statement by Senator Randolph on which petitioner relies (Pet. 11-13) speak restrictively of the contours of the amended definition's coverage of transportation workers, the Conference Report specifically clarifies

> that transportation and construction workers are covered only to the extent that they work in or around a coal mine and are exposed to coal dust. The conference substitute elsewhere provides that coal mine construction and transportation employers who are not also mine operators shall not be obligated to purchase insurance * * * [but] shall be individually liable for the payment of approved claims in appropriate cases.

H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. 15-16 (1978). Consistent with the language of the amended definition, the Conference Report, which

the court below properly recognized as the most persuasive evidence of congressional intent, Pet. App. 7a n.3, indicates that Congress intended the Act to cover transportation workers who work in or around coal mines and are exposed to coal dust. See *Louisville & N. R.R.* v. *Donovan*, 713 F.2d 1243, 1248 (6th Cir. 1983), cert. denied, 466 U.S. 936 (1984); cf. *Otis Elevator Co.* v. *Secretary of Labor*, 921 F.2d 1285 (D.C. Cir. 1990) (Congress intended to expand FMSHA's definition of "operator" in 1977 notwithstanding two limiting "snippets" of legislative history).

The court of appeals' determination is also supported by the Black Lung Benefits Act's statutory purpose of providing benefits to workers at coal mines when those workers are disabled by exposure to coal dust. Petitioners err in attaching significance (see Pet. 9-10) to the fact that railroad workers are covered by other federal legislation, since those statutes by their terms do not preclude the availability of benefits under other programs, such as the black lung benefits program. See *Louisville & N. R.R.* v. *Donovan*, 713 F.2d at 1248 n.3.[6] Nor is there any provision in the Black Lung Benefits Act that restricts coverage based on receipt of benefits under these other programs. Although petitioner argues (Pet. 10) that the existence of other federal benefit programs for railroad workers indicates that Congress could not have "intended to include railroad workers under [the Black Lung Benefits Act] with-

[6] Indeed, FELA—upon which petitioner primarly relies (Pet. 9-10)—specifically states that it does not limit rights or liabilities under other federal programs. 45 U.S.C. 58. Moreover, as the court below recognized, Pet. App. 8a, liability under FELA requires negligence, while liability under the Black Lung Benefits Act does not.

out even addressing the potential for overlapping coverage, [or] duplicative benefits," it is more reasonable to conclude that "had Congress intended to provide an exception for independent railroad companies, it would have done so." Pet. App. 25a.

3. Petitioner also contends (Pet. 14-16) that certiorari is warranted because the court of appeals' decision conflicts with the vacated decision of the district court in *Louisville & N. R.R.* v. *Donovan*, No. 80-0611-L(G) (W.D. Ky. 1981), rev'd, 713 F.2d 1243 (6th Cir. 1983), cert. denied, 466 U.S. 936 (1984). There is no merit in this contention. As a general matter, a conflict between a court of appeals decision and a district court decision would not establish "special and important reasons" for this Court to exercise its discretionary jurisdiction, even if the lower court's decision had not been reversed on appeal. See Sup. Ct. R. 10.1.

To be sure, the Sixth Circuit specifically based its reversal in *Louisville & N. R.R.* on the district court's lack of jurisdiction to review the Department of Labor's guidelines defining "the transportation of coal" under the Black Lung Benefits Act, and it disclaimed "the intent of making any definitive construction" of the Act. But the court also stressed Congress's explicit recognition "that a person working in transportation in or around a coal mine might be exposed to coal dust as a result of such employment and should not be deprived of [Black Lung Benefits Act] benefits merely because its employer is not an 'operator' in the traditional sense." 713 F.2d at 1249. In addition, the court criticized the district court's construction of the statute as excluding the railroad industry, stating:

> The statute, however, far from clearly excluding railroads, expressly encompasses not only mine operators in the traditional sense but also "any independent contractor performing services or construction at [a] mine." 30 U.S.C. § 802(d). This expanded definition does not clearly exclude railroads, especially when viewed in conjunction with the amended definition of "miners" which includes "an individual who works or has worked in . . . transportation in or around a coal mine . . . ." 30 U.S.C. § 902(d).

713 F.2d at 1247. Thus, the court of appeals' decision in *Louisville & N. R.R.* is consistent with the court's decision in this case.

There is similarly no merit to petitioner's suggestion (Pet. 16-17) that the court of appeals' decision in this case conflicts with the Eleventh Circuit's decision in *Fox* v. *Director, OWCP*, 889 F.2d 1037 (1989). The *Fox* case involved a worker at a coke oven—not a railroad or transportation worker. The Eleventh Circuit found that the coke oven worker was not a miner because "the washing and crushing of coal performed [at the coke oven] were the first steps in the coke manufacturing process rather than the last step in the coal extraction and preparation process." *Id.* at 1042. The court relied on the Senate Report for the limited point that "coverage of coal preparation activities is contingent on such activities being an integral part of the coal production process" rather than merely "coal processing activities (such as coke production) performed by the ultimate consumer for his own use." *Id.* at 1040-1041. The Eleventh Circuit's analysis would not require a different outcome here since Roberson hauled raw—not processed—coal, and the ALJ explicitly and cor-

rectly found that Roberson's activities were an integral part of the preparation process.[7]

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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[7] Petitioner asserts (Pet. 5-6) that the decision below will expose railroads to "thousands" of claims for black lung benefits, but can identify only 174 pending claims. Even as to those, of course, "[t]he demanding tests of function and situs must be met." Pet. App. 10a.

APPENDIX

U.S. DEPARTMENT OF LABOR
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OWCP No. 223-12-5682

Case No. 83-BLA-7557
IN THE MATTER OF OLEN R. ROBERSON, CLAIMANT

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
EMPLOYER

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, PARTY-IN-INTEREST

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BEFORE: LAWRENCE E. GRAY
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* ("the Act"). In accordance with the Act and the Regulations issued thereunder, found in Title 20 of the Code of Federal Regulations ("the Regulations"), this case was referred for hearing to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Program ("the Director"), on September 14, 1983.

A formal hearing was held in Abingdon, Virginia on July 15, 1985, at which all parties were afforded the opportunity to present evidence and argument as provided in the Act and the Regulations. The record was held open for the receipt of additional medical evidence and briefs.

Statement of the Case

Claimant Olen R. Roberson, a 68-year-old man with a 9th-grade education, seeks benefits under the Act, asserting that he is totally disabled as a result of coal workers' pneumoconiosis. Employer contests (1) whether it properly has been designated as the

responsible operator; (2) whether Claimant is a miner within the meaning of the Act and the Regulations; (3) whether Claimant has pneumoconiosis within the meaning of the Act and the Regulations; (4) if so, whether Claimant's pneumoconiosis arose out of coal mine employment; (5) whether Claimant is totally disabled within the meaning of the Act and the Regulations; and (6) whether Claimant's disability, if any, resulted from pneumoconiosis. The Director maintains that Employer properly has been designated as the responsible operator and that Claimant qualifies as a miner.

Findings of Fact and Conclusions of Law

Coal Miner

"The term 'miner' means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or arond a coal mine, to the extent such individual was exposed to coal dust as a result of such employment." 30 U.S.C. § 902(d); *see* 20 C.F.R. § 725.202(a).

Claimant commenced employment with Norfolk and Western Railway Company on October 10, 1947. Claimant worked continuously for Norfolk and Western until October 1, 1979, when Claimant retired.

Between 1947 and 1956, Claimant served as a Brakeman on certain "local runs." These trains carried "local freight"; they did not carry coal. There being no indication that Claimant's duties involved the extraction or preparation of coal. I find that Claimant was not a coal miner during this period.

From April or May 1956 until the early part of 1973, Claimant served as a brakeman and conductor on the "Carbo run." The trains on this run hauled raw coal across a mountain from the mine site to a preparation plant, where the coal was cleaned, washed and graded.

During the trip from the mine site to the preparation plant, Claimant was exposed to coal dust that blew from the loaded cars. When checking the couplings between the cars and performing other duties at the mine site and the preparation plant, Claimant was exposed to coal dust that had been pulverized between rails and wheels and stirred by air hoses and the movement of the workers' feet. "As far as dust exposure, you could blow your nose and it would be like tar, and it looked like real coal dust," Claimant testified. "If you would cough, it looked like real coal dust. So, we were exposed to an awful lot of dust." Relying upon Claimant's credible testimony, I find that he was exposed to coal dust as a result of his employment as a coal transportation worker. If this employment occurred "in or around a coal mine," Claimant falls within the statutory definition of "miner."

The Benefits Review Board has established a three-part test for determining whether a claimant qualifies as a "miner":

> First, claimant must prove that the coal with which he worked was still in the course of being processed, and not yet a finished product in the stream of commerce (status of the coal test). Second, claimant must establish that the worker performer a function integral to the coal production process (*i.e.*, the extraction or preparation of coal), and not one merely ancillary to the de-

> livery and commercial use of processed coal (function test). The status of the coal and the functions performed by the worker are questions of fact to be resolved by the administrative law judge. Third, the work must have occurred in or around a coal mine or coal preparation facility (situs test). A coal mine is an area of land used or intended to be used for the extraction or preparation of coal, including a custom coal preparation facility.

Whisman v. Director, 8 BLR 1-96, 1-97 (1985) (citations omitted). Claimant's letter of February 12, 1980 and his uncontradicted testimony indicate that Claimant primarily worked with raw coal rather than processed coal during his employment on the "Carbo run." Relying upon this evidence, I find that Claimant has satisfied the "status of the coal" test.

In *Roberts v. Weinberger*, 527 F.2d 600 (4th Cir. 1975), the United States Court of Appeals for the Fourth Circuit found that a truck driver's delivery of coal from a mine site to a tipple for processing, grading, and loading was part of the extraction and preparation process. Similarly, in *Seltzer v. Director*, 7 BLR 1-912 (1985), the Board found that the haulage of coal from a mine to a "breaker" for washing, crushing and sizing constituted coal mine employment. Likewise, I find in this case that Claimant's transportation of coal from the mine to the preparation plan was integral to the coal production process and therefore satisfies the "function" test. The case law simply does not support Employer's position that the haulage of raw coal is not the work of a "miner."

Employer argues that Claimant did not spend a significant portion of his workday at a coal mine site

or coal preparation facility. *See Bower v. Amigo Smokeless Coal Co.*, 2 BLR 1-729 (1979). The facts do not support this argument. At the coal mine site and preparation plant, Claimant performed duties such as coupling cars, knocking brakes, checking car numbers, classifying cars, and keeping records. According to the letter of February 12, 1980, Claimant sometimes handled 250-300 cars in a day. According to Claimant's testimony, he sometimes "walked" a hundred cars at a time; and then walked back. These duties necessarily occupied a significant portion of time. Relying upon the evidence discussed above, I find that Claimant has satisfied the "situs" test. I further find that Claimant worked "in or around a coal mine" within the statutory definition of "miner." This conclusion is consistent with the *Roberts* decision, in which the court of appeals found that a truck driver who hauled coal from a mine site to a preparation facility "was employed *in* a coal mine." 527 F.2d at 602 (emphasis supplied by court). Citing the broad definition of "coal mine" found at 20 C.F.R. § 410.110(h), the court explained "that the boundaries of the mine extend at least to the point where the coal is processed and loaded for further shipment." *Id.*

Claimant's employment on the "Carbo run" satisfies each of the three parts of the *Whisman* test. Accordingly, I find that Claimant qualifies as a "miner" within the meaning of the Act and the Regulations.

Between 1973 and 1979, Claimant worked as a conductor out of Norton. During this period, Claimant primarily hauled processed coal. The transportation of processed coal in the stream of commerce is not integral to the extraction or preparation process

and therefore does not qualify as coal mine employment.

Dependents

For the purpose of augmentation of benefits, Claimant has one dependent: his wife, Ruby Helen Roberson.

Responsible Operator

Section 725.491(a) of the Regulations defines "operator" as follows:

> In accordance with section 3(d) of the Act [30 U.S.C. § 802(d)], an operator for purposes of this part is "any owner, lessee or other person who operates, controls, or supervises a coal mine or any independent contractor performing services or construction at such mine." In accordance with sections 402(d) and 422(b) of the Act, certain other employers, including those engaged in coal mine construction, maintenance, and transportation, shall also be considered to be operators for purposes of this part. An independent contractor or self-employed miner, construction worker, coal preparation worker, or transportation worker may also be considered a coal miner operator for purpose of this part. *It is Congress' intent that any employer of a miner as defined in § 725.202(a) shall, to the extent appropriate, be considered an operator for the purposes of this part, and the provisions of this part shall be construed in accordance with this intent.*

(Emphasis added.) The last sentence of Section 725.491(a) supports the position advanced by the Director, who argues that Norfolk and Western is "the

responsible operator in this case because it is the employer of a miner as defined in the Act."

In *Louisville and Nashville Railroad Company et al. v. Donovan*, No. 80-0611-L(G) (W.D. Ky. 1981), the United States District Court for the Western District of Kentucky, without distinguishing the transporation of raw coal to a preparation plant from the transportation of processed coal within the stream of commerce, held that railroads are not "operators." The court enjoined the Department of Labor from applying the Federal Coal Mine Health and Safety Act, as amended by the Black Lung Benefits Act of 1972 and the Black Lung Benefits Reform Act of 1977, to railroads. "A railroad obviously does not extract coal," the court reasoned, "nor does the work done by a railroad in connection with transporting coal fall within the definition of 'work of preparing the coal' set forth in 30 U.S.C. § 802(i)."

That reasoning does not accord with the decision of the United States Court of Appeals for the Fourth Circuit which found that the transportation of raw coal to a preparation facility was part of the preparation process. *Roberts v. Weinberger*, 527 F.2d 600 (4th Cir. 1975); *see also Whisman v. Director*, 8 BLR 1-96 (1985); *Seltzer v. Director*, 7 MLR 1-912 (1985). This case having originated in the Fourth Circuit, I place no weight upon the district court's opinion.

The regulatory definition of "operator" includes "any independent contractor performing services . . . at [a] mine." 20 C.F.R. § 725.491(a). In *Itell v. Ritchey Trucking Company*, 8 BLR 1-356 (1985), the Benefits Review Board held that a lessor of heavy equipment, having a continuing presence at a mine site and providing essential mine services, was an

"operator" within the meaning of the Act. Likewise, I find that Norfolk and Western, having a continuing presence at the mine site and providing services essential to the preparation of the coal, is an "operator." This conclusion is consistent with Section 725.491(a) of the Regulations, which advises that "any employer of a miner as defined in § 725.202(a) shall, to the extent appropriate, be considered an operator . . . ." *See also* 20 C.F.R. § 725.491(c)(1).

An operator is not the "responsible operator" unless it satisfies the requirements of Section 725.492 of the Regulations. The evidence indicates that Employer satisfies these requirements. Accordingly, I find that Employer properly has been designated as the "responsible operator" in this case.

Length of Coal Mine Employment

As discussed *supra*, all of Claimant's coal mine employment occurred from 1956 to 1973 during Claimant's tenure as a brakeman and conductor on the "Carbo run." During this period, Claimant occasionally served on other "runs." Claimant estimated that he worked on the "Carbo run" for a total of 14 years during this period. Claimant's testimony is credible and uncontradicted. Relying upon Claimant's testimony, I find that Claimant accumulated 14 years of coal mine employment.

Applicable Part of the Regulations

Claimant filed an application for benefits with the Department of Labor on February 27, 1978, prior to the effective date of Part 718 of the Regulations. Claimant having accumulated more than 10 years of coal mine employment, I will consider this case under Part 727. To secure benefits, Claimant must estab-

lish that he is totally disabled due to pneumoconiosis arising out of coal mine employment.

The Interim Presumption

Section 727.203(a) of the Regulations provides that a living miner with more than 10 years of coal mine employment is presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment if the evidence satisfies any one of the requirements set forth in subsections (1) through (4). In *Stapleton v. Westmoreland Coal Company*, 785 F.2d 424 (4th Cir. 1986), the United States Court of Appeals for the Fourth Circuit held that a single qualifying ventilatory study is sufficient to trigger the interim presumption under Subsection 727.203 (a)2). Applying *Stapleton*, I find that the qualifying, conforming ventilatory study of July 2, 1985 triggers the interim presumption.

Rebuttal

Section 727.203(b) of the Regulations provides four means of rebutting the interim presumption. In determining whether rebuttal has been established, all relevant medical evidence must be considered.

Under Subsection 727.202(b)(1), the presumption is rebutted if the evidence establishes that the miner is doing his usual coal mine work or comparable and gainful work. Because Claimant has not worked at any job since his retirement in 1979, the interim presumption is not rebutted under Subsection 727.203(b)(1).

Under Subsection 727.203(b)(2), the presumption is rebutted if the evidence establishes that the miner is able to do his usual coal mine work or comparable and gainful work. The Benefits Review Board has held that an employer may establish rebuttal under

this subsection by demonstrating that the claimant does not suffer from a totally disabling respiratory impairment. *Bibb v. Clinchfield Coal Co.*, 7 BLR 1-134 (1984).

No physician offered an opinion that Claimant does not suffer from a totally disabling respiratory impairment. Indeed, Dr. Joseph F. Smiddy and Dr. John G. Byers, Jr., specifically diagnosed such a condition. The qualifying results of all of this ventilatory studies of record support these opinions. On the basis of this evidence, I find that the interim presumption is not rebutted under Subsection 727.203 (b)(2).

Under Subsection 727.203(b)(3), the presumption is rebutted if the evidence establishes that the disability of the miner did not arise in whole or in part out of coal mine employment. Under Subsection 727.203(b)(4), the presumption is rebutted if the evidence establishes that the miner does not have pneumoconiosis. The X-ray evidence of record, in conjunction with the medical opinions of record, is relevant to rebuttal under both of these subsections. The record contains the following X-ray evidence:

Date of X-ray	Reader	Qualifications [1]	Interpretation
1/24/79	H.L. Bassham	Board-certified radiologist	0/0

[1] Where the physicians' qualifications are not in evidence, I have taken official notice of their qualifications by reference to the following sources: an official listing provided by the U.S. Department of Health and Human Services; *Marquis Who's Who Directory of Medical Specialists*, published under the direction of the American Board of Medical Specialties; and the 30th edition of the *American Medical Directory*, published under the direction of the American Medical Association.

Date of X-ray	Reader	Qualifications	Interpretation
	E.D. Aycoth	Board-eligible radiologist and B-reader	1/1 p, p
11/1/79	J.G. Byers Jr.	Pulmonary specialist; Board-certified in internal medicine	0/0
8/24/84	S.N. Fisher	Board-certified radiologist and B-reader	1/1 p, p
	E.D. Aycoth	Board-eligible radiologist and B-reader	1/0 p, q
	M.A. Bassali	Board-certified radiologist and B-reader	1/0 p, s
	W.S. Cole	Board-certified radiologist and B-reader	0/0
	P.S. Wheeler	Board-certified radiologist and B-reader	moderate emphysema no pneumoconiosis
7/2/85	L.H. Westerfield	Radiologist	Mild COPD and emphysema; no pneumoconiosis

In addition to this X-ray evidence, the record contains relevant medical opinions submitted by Dr. Smiddy, Dr. Byers, and Dr. Richard S. Buddington.

Dr. Buddington and Dr. Byers both examined Claimant in 1979. Relying upon Dr. Bassham's 0/0 interpretation of the January 1979 X-ray, Dr. Buddington concluded that Claimant's "primary pulmonary disorder is probably large and small airway obstruction." Relying upon his own interpretation of the November 1979 X-ray and Claimant's history of smoking (one pack per day for 10-15 years before quitting in the early 1960's), Dr. Byers concluded

that Claimant suffered from emphysema, chronic bronchitis and "an element of reversible obstructive airway disease" that "could have been caused by chronic tobacco abuse or by some granulomatous disease of the lung resulting in pulmonary calcifications." In Dr. Byers' opinion, coal dust exposure did not cause Claimant's pulmonary disease.

Both physicians relied upon X-ray evidence. Neither physician had an opportunity to consider the most recent X-rays of August 1984 and July 1985. Because pneumoconiosis is a progressive disease, these two X-rays are the most probative as to the existence of pneumoconiosis. Of the six interpretations of record of these two X-rays, five were rendered by B-readers who also were Board-certified or Board-eligible radiologists. Of these five readers, three diagnosed pneumoconiosis. In light of these circumstances, I find that the opinions of Drs. Buddington and Byers are insufficient to rebut the interim presumption under Subsections 727.203(b)(3) or 727.203(b)(4). I rely upon the following considerations: (1) Drs. Buddington and Byers based their opinions upon X-ray evidence without having had an opportunity to consider the most probative X-ray evidence of record; and (2) the positive readings rendered by Drs. Fisher, Aycoth, and Bassali of the August 1984 X-ray suggest that Claimant's condition changed subsequent to Dr. Buddington's and Dr. Byers' examinations. My conclusion is not affected by the negative opinions readings of the August 1984 X-ray offered by Drs. Cole and Wheeler, whose qualifications are equal to those of Drs. Fisher and Bassali. Applying the "true doubt" rule, I must resolve these conflicting X-ray interpretations in favor of Claimant. My conclusions also is not affected by the negative reading of the July 1985 X-ray offered

by Dr. Westerfield, whose qualifications are inferior to those of Drs. Fisher, Aycoth and Bassali. Moreover, my conclusion is supported by 1985 opinion of Dr. Smiddy, who concluded that Claimant suffered from a "severe respiratory impairment with total disability related to a combination of severe chronic obstructive pulmonary disease and an element of significant coal dust exposure." Dr. Smiddy having examined Claimant significantly later than Drs. Buddington and Byers, I find that Dr. Smiddy's opinion warrants greater weight than the opinions of the other physicians.

For the reasons discussed above, I find that the medical opinions of Drs. Buddington and Byers in conjunction with the negative X-ray interpretations of Drs. Cole, Wheeler and Westerfield, in light of the contradictory opinions and readings of Drs. Smiddy, Fisher, Aycoth, and Bassali, are insufficient to rebut the interim presumption under Subsections 727.203 (b) (3) or 727.203 (b) (4).

Entitlement

Employer has failed to rebut the interim presumption. Accordingly, I find that Claimant is entitled to benefits under the Act as augmented by reason of his dependent sponse.

The evidence does not establish a date of onset of total disability. For this reason, benefits are payable from the beginning of the month when the claim was filed or the month when review was elected under Part 727 of the Regulations. 20 C.F.R. § 725,503 (b). Unless the miner suffers from complicated pnenmoconiosis, however, no benefits are payable for any period during which the miner engaged in coal mine work or comparable and gainful work. 20 C.F.R. § 725.503A.

Claimant filed his application for benefits in February 1978. He did not retire until October 1979. In the interim, Claimant served as a conductor out of Norton. Claimant's description of his duties during this period indicates that his work was substantially similar to his coal mining work. Claimant simply hauled a different product: processed coal rather than raw coal. Because Claimant engaged in "comparable and gainful work" until October 1979, he is entitled to benefits commencing as of the beginning of that month.

Based upon the forgoing findings of fact and conclusions of law, and upon the entire record, I hereby make and enter the following order.

ORDER

Employer, Norfolk and Western Railway Company, is ordered to provide for payment to Claimant, Olen R. Roberson, of all benefits to which he is entitled under the Act, as augmented by reason of his dependent sponse, commencing as of October 1, 1979.

Administrative Law Judge

/s/ Lawrence E. Gray
LAWRENCE E. GRAY

Dated: Dec. 30, 1986
Washington, D.C.

NOTICE OF APPEAL RIGHTS: Any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board, 1111 20th Street, N.W., Suite 757, Washington, D.C. 20036 (20 C.F.R. § 725.481).

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